Lower Canada.
QUEEN'S BENCH. } **IN APPEAL.**

R. C. A. GUGY,

Appellant;

and

J. DONAGHUE,

Respondent.

Factum of the Appellant.

May 1861.

LOWER CANADA.
QUEEN'S BENCH. } IN APPEAL.

R. C. A. GUGY.

Lower Canada.
QUEEN'S BENCH.

In the Cause

IN APPEAL

BARTHOLOMEW CONRAD AUGUSTUS GUGY,

(Defendant in the Court below,)

APPELLANT;

and

JOHN DONAGHUE,

(Plaintiff in the Court below,)

RESPONDENT.

FACTUM OF THE APPELLANT.

Upon the subject of the domicile and addition of the plaintiff the declaration is altogether silent. His name it is true is prefixed, but like the number merely to indicate the cause. In the praecipe and in the writ annexed to the declaration the plaintiff is styled John Donaghue, of the City of Quebec, in the County of Quebec, Printer. These few words contain matter for an exception à la forme, for no City of Quebec can be found in the County of Quebec, and as the appellant is advised the declaration to be complete should contain the names and description of the parties. Accordingly the defendant filed an exception à la forme, (exhibit No. 6,) and the plaintiff pleaded thereto negatively.

On the 28th December, 1850, the plaintiff inscribed the cause "upon the roll of enquête," and "upon the role de droit for hearing upon the merits."

On the 4th January last the defendant exhibited and filed a motion to examine the plaintiff on faits et articles. It was subsequently admitted that the plaintiff, though styled of Quebec resided in New York, and of course he could not be found.

On the ninth of January last, the cause was called from the roll of enquête and hearing in pursuance of the plaintiff's inscription to that effect. It is important to add that the Honorable Judge Stuart was the presiding Judge.

On that day the Appellant filed an affidavit (exhibit No. 30.) disclosing grounds upon which he expected that his motion to postpone the hearing (exhibit No. 31,) would be granted. The application was rejected, and the defendant was compelled to proceed. The defendant excepted to this order, exhibit No. 38.

The order to which the defendant thus excepted was, as the defendant was led to believe the result of an oral declaration made on that occasion by the plaintiff's Attorney, to the effect "That the plaintiff resided at New York, No. 425, Pearl Street." Conforming to this declaration, a declaration at variance with the domicile assumed by the plaintiff in his own writ, the defendant moved (exhibit No. 37,) for a Commission to examine the plaintiff in New York.

This application was continued to the second of February following, and his Honor Mr. Justice Stuart, by an exercise of the power vested in him, proceeded to the examination of such witnesses as on the spur of the occasion were to be obtained.

Yielding as he must to the order so made, the defendant looking upon himself as the subject of a conspiracy moved (exhibit No. 32,) that the witnesses should be directed to leave the Court room. In this application he failed: why, he had no basis even for a surmise.

On the second of February, the cause was called from the roll, and without pronouncing any decision upon the application for a commission to New York, the Court took the cause en délibéré.

On this occasion it was a different Judge—namely His Honor Mr. Chief Justice Bowen who presided. On the fourth the Chief Justice dismissed the defendant's exception à la forme as containing matters "purely imaginary."—The defendant excepted also to this judgment.

The appellant submits that the judge who heard the evidence should have decided the cause.

He submits further, that being taken by surprise in relation to the domicile of the plaintiff, he was entitled to a commission for his examination on faits et articles in New York.

He submits lastly that no judgment could legally be pronounced upon the merits, unless his motion for a commission had been preliminarily disposed of.

Although the oral evidence has little bearing on the subject in issue, in accordance with the order of the Court, it has been transcribed and is offered herewith.

Quebec, 5th May, 1860.

A. GUGY, for Appellant.

LOWER CANADA.

No. 1896.

IN APPEAL.

JOHN DONAGHUE, Plaintiff;

and

B. C. A. CUGY, Defendant.

Evidence of the Defendant.

RICHARD KWETT, of the City of Quebec, Bailiff, aged above 21 years.

Within the last two years I sought for the present plaintiff, and served him with Process in a suit, in which the present defendant was plaintiff, and the present plaintiff defendant; I did my best to find him, but I could not succeed. I was seeking for him during a period of about six months. I was informed that he had left the country and was gone to New York. Had he had a domicile in this city I would have found him.

Cross-examined.—I have been informed that the present plaintiff had no domicile in this city and none for the last six months. I have been to seek him at his father's house several times. I have been told by twenty people that the present plaintiff had no domicile in this city of Quebec, but cannot recollect the name of any of them, but I know them by eye sight. I cannot say whether they were acquaintances or friends of the said Donaghue, but I suppose they were acquaintances. I think so—I am not sure.

PATRICK FORD, of the City of Quebec, Bailiff, aged above 21 years.

I am a Bailiff of this Court.

Question.—Were you charged with a warrant for the apprehension of the present plaintiff Donaghue at the suit of the present defendant?

Answer.—I must answer that question, unless the Court tells me.

The witness answers—I was. During a month or so I made diligent search for the present plaintiff and I could not find him. The warrant entrusted to me for his apprehension, is filed in this cause, and my return is endorsed upon it, and it is a true return. I remember receiving that warrant at the period of its date, to wit, about the twenty-sixth day of August last. During the course of the time from the receiving of the warrant to the date of its return, I could not see the present plaintiff, but I heard of him, I heard that the present plaintiff was in the States.

Cross-examined.—I inquired where the present plaintiff lived from persons who knew him, and I asked them where he was stopping; the parties from whom I inquired, told me where he lived for a time, but that he was not living in town at that time.

JOHN M'NAUGHTY, of Quebec, Bailiff, aged above 21 years.

I know the plaintiff in this cause, and I have sought for him within the last two years. I had a copy of a Judgment to serve upon him once, and I could not find him. I now forget how many months I was seeking for him, without being able to find him. It was a serious search and I made endeavours to find him. The judgment which I had to serve was a judgment at the suit of the present defendant against the present plaintiff.

Cross-examined.—It was for upwards of six months since I searched for him last, but I saw the defendant in Quebec several times since then.

I cannot now recollect of whom I made inquiries for the plaintiff, nor can I say whether the parties to whom I made those inquires were acquainted with the plaintiff or not. I have known the plaintiff for the last seven years.

I cannot say whether he resided the whole time in Quebec or not; but I have frequently seen him in Quebec during that period. In fact I have seen him the same I used to see persons whom I was accustomed to see and whom I know.

Re-examined.—I have seen him often within a year.

WILLIAM EDMUND DUGGAN, Esquire, of the City of Quebec, Advocate, aged above 21 years.

The plaintiff in this cause is now residing in New York. During the session of Parliament he resided in Toronto. During the portion of the winter, that is last winter, the plaintiff left here to my knowledge seeking employment during the session of Parliament then approaching, and I believed remained there till the session closed, when he returned to Quebec.